APPEAL NO. 180043
FILED MARCH 1, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 16, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to an L5-S1 disc bulge with left paracentral disc protrusion with suspected rupture of the annulus inferior and extruded disc material into the thecal sac dorsal to the S1 vertebral body; lumbar radiculopathy; left S1 radiculopathy; enhancement of the left L5 nerve root from the conus medullaris to their exit through the left L5-S1 neural foramina and radiculitis; and severe narrowing of the thecal sac from L5-S1 inferiorly with associated severe narrowing of the left lateral recess and minimal encroachment on the inferior neural foramina as the disc herniation extends inferior to the disc space; (2) the compensable injury of (date of injury), does not extend to L4-5 mild facet arthropathy with mild hypertrophy of the ligamentum flavum; facet hypertrophy; scoliosis; tiny left superior pole renal cyst; or T12 through L4 mild facet arthropathy; (3) the respondent (claimant) has not reached maximum medical improvement (MMI); (4) because the claimant has not reached MMI, an impairment rating (IR) cannot be assigned; and (5) the claimant had disability beginning on April 20, 2016, and continuing through the date of the CCH.

The appellant (self-insured) appealed the ALJ's determinations made in the claimant's favor regarding extent of injury, MMI/IR, and disability as being contrary to the great weight and preponderance of the evidence. The self-insured argued further that the ALJ erred as a matter of law in finding that the claimant had not reached MMI when, in fact, the claimant reached statutory MMI on November 8, 2017, a date prior to the date of the CCH. The appeal file does not contain a response from the claimant.

The ALJ's determination that the compensable injury of (date of injury), does not extend to L4-5 mild facet arthropathy with mild hypertrophy of the ligamentum flavum; facet hypertrophy; scoliosis; tiny left superior pole renal cyst; or T12 through L4 mild facet arthropathy was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she sustained an injury on (date of injury), when she lifted a box of apples and twisted to place the box on a pallet. The parties stipulated, in part, that the compensable injury includes a lumbar sprain/strain.

EXTENT OF INJURY

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

The ALJ's determination that the compensable injury extends to an L5-S1 disc bulge with left paracentral disc protrusion with suspected rupture of the annulus inferior and extruded disc material into the thecal sac dorsal to the S1 vertebral body; lumbar radiculopathy; left S1 radiculopathy; enhancement of the left L5 nerve root from the conus medullaris to their exit through the left L5-S1 neural foramina and radiculitis; and severe narrowing of the thecal sac from L5-S1 inferiorly with associated severe narrowing of the left lateral recess and minimal encroachment on the inferior neural foramina as the disc herniation extends inferior to the disc space is supported by sufficient evidence and is affirmed. The fact that another fact finder may have drawn different inferences from the evidence which would have supported a different result does not provide a basis for us to disturb the challenged determination. *Salazar v. Hill*, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi, 1977, writ ref'd n.r.e.).

DISABILITY

The ALJ's determination that the claimant had disability beginning on April 20, 2016, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30) provides MMI means the earlier of: (A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive

weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

In her decision signed November 17, 2017, the ALJ determined that the claimant had not reached MMI, as certified by the designated doctor, (Dr. Q), in his Report of Medical Evaluation (DWC-69) dated April 20, 2017. The ALJ further determined that because the claimant has not reached MMI, an IR cannot be assigned.

We note that the self-insured argued at the CCH that the claimant had reached statutory MMI on November 7, 2017,[1] a date prior to the date of the hearing; however, the ALJ made no mention or finding regarding statutory MMI. In evidence is the self-insured's Notification of First Temporary Income Benefit Payment (PLN-2) dated November 30, 2015, which indicates that the claimant's temporary income benefit payments began to accrue on November 10, 2015, the eighth day of disability. The evidence in this case reflects that the date of statutory MMI may have passed prior to the November 16, 2017, date of the CCH. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a Decision and Order dated after the date of statutory MMI. *See* Appeals Panel Decision (APD) 131554, decided September 3, 2013.

There are two other certifications in evidence. In an alternate certification dated April 20, 2017, Dr. Q determined that the claimant reached MMI on April 19, 2016, and assigned an IR of five percent for the lumbar sprain/strain injury only. This certification cannot be adopted because it fails to rate all the conditions determined by the ALJ to be part of the compensable injury. In a second alternate certification dated April 20, 2017, Dr. Q determined that the claimant had not reached MMI when considering all of the disputed conditions. In this certification Dr. Q considers conditions determined by the ALJ not to be part of the compensable injury. Furthermore, as mentioned above, the evidence reflects that the claimant may have reached statutory MMI prior to the date of the CCH. Because there is no certification in evidence which determines that the claimant has reached MMI and which rates the entire compensable injury, we reverse

[1] The self-insured argued the November 8, 2017, statutory MMI date in its appeal, but argued the November 7, 2017, statutory MMI date at the time of the November 16, 2017, CCH.

the ALJ's determination that the claimant has not reached MMI and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury extends to an L5-S1 disc bulge with left paracentral disc protrusion with suspected rupture of the annulus inferior and extruded disc material into the thecal sac dorsal to the S1 vertebral body; lumbar radiculopathy; left S1 radiculopathy; enhancement of the left L5 nerve root from the conus medullaris to their exit through the left L5-S1 neural foramina and radiculitis; and severe narrowing of the thecal sac from L5-S1 inferiorly with associated severe narrowing of the left lateral recess and minimal encroachment on the inferior neural foramina as the disc herniation extends inferior to the disc space.

We affirm the ALJ's determination that the claimant had disability beginning on April 20, 2016, and continuing through the date of the CCH.

We reverse the ALJ's determinations that the claimant has not reached MMI and that the claimant's IR cannot be determined, and we remand the issues of MMI/IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. Q is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. Q is still qualified and available to be the designated doctor. If Dr. Q is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The ALJ is to take a stipulation from the parties regarding the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the ALJ is to make a determination of the date of statutory MMI in order to inform the designated doctor of that date.

The ALJ is to advise the designated doctor that the (date of injury), compensable injury extends to a lumbar sprain/strain; an L5-S1 disc bulge with left paracentral disc protrusion with suspected rupture of the annulus inferior and extruded disc material into the thecal sac dorsal to the S1 vertebral body; lumbar radiculopathy; left S1 radiculopathy; enhancement of the left L5 nerve root from the conus medullaris to their exit through the left L5-S1 neural foramina and radiculitis; and severe narrowing of the thecal sac from L5-S1 inferiorly with associated severe narrowing of the left lateral recess and minimal encroachment on the inferior neural foramina as the disc herniation

extends inferior to the disc space. The ALJ is also to advise the designated doctor that the compensable injury does not extend to L4-5 mild facet arthropathy with mild hypertrophy of the ligamentum flavum; facet hypertrophy; scoliosis; tiny left superior pole renal cyst; or T12 through L4 mild facet arthropathy

The ALJ is to advise the designated doctor of the date of statutory MMI and request that the designated doctor give an opinion concerning the claimant's date of MMI and rate the entire compensable injury in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) and the provisions of Rule 130.1(c)(3) considering the medical record and the certifying examination. The date of MMI cannot be later than the date of statutory MMI. The parties are to be provided copies of the designated doctor's certification of MMI and assignment of IR and allowed an opportunity to respond. The ALJ is to determine the issues of MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

CONFIDENTIAL
Tex. Labor Code § 402.083

The true corporate name of the insurance carrier is **HEREFORD INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SHERI BLANKENSHIP, SUPERINTENDENT
601 NORTH 25 MILE AVENUE
HEREFORD, TEXAS 79045.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge